

PAG Testimony on Retroactivity of 2025 Guideline Amendments

The PAG welcomes the opportunity to provide testimony on the potential retroactive application of four recently adopted guideline amendments: amendments under the drug guideline expanding the availability of the mitigating role cap under §2D1.1(a)(5) and the minimal role adjustment under §3B1.2; and amendments resolving circuit splits related to the physical restraint enhancement under the robbery guideline and the definition of intervening arrest under the criminal history guideline. The PAG would like to first address, briefly, the criteria for retroactivity.

A. Criteria for Retroactivity

As contained in our written comment on the criteria for retroactivity,¹ the PAG recommends that the Commission eliminate the current criteria set forth in the Background Commentary to §1B1.10 and amend the Commission's Rules of Practice and Procedure to make amendments presumptively retroactive instead of prospective. In the PAG's view, presumptive retroactivity gives weight to the purpose of guideline amendments – which is the application of more fair and just sentencing guidelines. A presumptively prospective view results in sentencing disparities because the timing of sentencing dictates the length of sentences. A uniform retroactive approach will more broadly apply reform that is meant to promote fairness and proportionality.

A review of public comments submitted about retroactivity shows two areas of concern with broader retroactive application: (1) the administrative burdens of retroactive application of an amendment; and (2) diminishing the finality and predictability of sentences.² While these concerns are important to consider, neither outweighs the promotion of fairness that retroactive application brings to federal sentencing.

Presumptive prospective application does not reduce the administrative burden of guideline amendments because defendants seeking relief from federal sentences apply for that relief any time they believe they might be eligible. In the experience

¹ See generally Letter from PAG to U.S.S.C. (April 18, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf#page=43.

² See, e.g., Letter from Comm. on Crim. Law to U.S.S.C. (April 18, 2025) and Letter from Dep't of Justice to U.S.S.C. (April 18, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf.

of the PAG, whether or not the Commission announces retroactive application, the courts are flooded with requests for relief the moment amendments are passed, and sometimes even when they are merely proposed. The determination of prospective or retroactive application does not deter those seeking relief from applying and using court resources. The reality is that defendants do not use court resources exclusively when amendments are made retroactive – they use court resources any time they believe relief might be possible. Judges, court staff, probation officers, prosecutors and defense counsel exhaust resources every time the guidelines are amended, whether or not an amendment is made retroactive.

The analysis related to the current amendment regarding the mitigating role cap at §2D1.1(a)(5) under the drug guideline is a good example of the benefits of a retroactive default. The Commission’s analysis determined that 650 incarcerated defendants would be impacted by retroactivity, and the projected average reduction for these eligible individuals would be 12 months. The number of people impacted is significant and the amount of the reduction is significant as well.³

But the analysis does not evaluate how many *ineligible* defendants will still ask the court for its time and resources. The analysis does not prevent ineligible people from filing motions or asking for relief. The analysis, however, shows the incredible impact that retroactivity has on leveling sentencing disparities.

Further, the promise of finality should not outweigh retroactive application because fairness in application of the law is in the balance. If an unfair metric was applied at the time of sentencing, guideline amendments exist to promote a more fair sentencing structure. And, retroactive application does not guarantee a sentence reduction for every applicant. Instead, courts retain the power to determine whether a reduction is appropriate. If the finality of the original sentence and other factors outweigh the purpose of the amendment in an individual case, the court can decide not to apply a reduction. But presumptive retroactivity allows courts to engage in that analysis without the added administrative burden of determining retroactivity.

For the PAG, on behalf of its clients, if there is an administrative burden, or if finality is not always guaranteed, these are sacrifices worthy of the price for increased justice and fairness.

³ See U.S.S.C., *Retroactivity Impact Analysis of Certain 2025 Amendments* (“Retroactivity Impact Analysis”) at 7 (May 15, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2025-amendments/2025_Amdts-Retro.pdf.

B. The PAG Supports the Retroactive Application of the 2025 Amendments to the Drug Guideline

The PAG – in concert with the majority of commenters – strongly supports the retroactivity of the drug guideline amendments. The PAG views these amendments as addressing issues of fundamental fairness and equity, in the same way as prior amendments to the drug guideline. As the Federal Defenders point out, the Commission proposed the mitigating role cap amendment and guidance on the application of adjustments under §3B1.2 in response to criticism of the drug guideline as being overly reliant on drug quantity as a proxy for culpability. As a result, for defendants with low-level functions in a drug trafficking offense, the drug guideline has resulted in unfair sentences that are greater than necessary to accomplish the purposes of sentencing.⁴ These amendments rectify longstanding issues of inequity in the drug guideline, and they right the wrongs of a guideline that has for too many years resulted in sentences that are too high.

The Commission’s impact analysis shows that the mitigating role cap amendment may result in a relatively modest number of cases (650) eligible for a sentencing reduction of at least 12 months.⁵ Administrability is not as challenging with this amendment,⁶ and up to a 12 month reduction is significant, and meets the criteria for retroactivity.⁷ All factors support retroactive application of the amended provisions on the application of the mitigating role cap.

While the second part of the drug amendment, to expand the availability of minimal role adjustments under §3D1.2, may involve a higher number of potentially eligible cases, it also involves a potentially much larger reduction in sentence. As a result, the PAG agrees with the Defenders’ analysis that the higher number of potential

⁴ See Defender’s Comment on Possible Retroactive Application of Amended Guidelines (“Defender Comment”) at 5 (June 2, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202506/90FR19798_comment.pdf#page=26.

⁵ See Retroactivity Impact Analysis at 7.

⁶ See, e.g., Letter from Criminal Law Committee to U.S.S.C. at 6 (June 2, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202506/90FR19798_comment.pdf#page=5

⁷ See U.S.S.G. §1B1.10 cmt. (Background) (explaining that the Commission does not make retroactive “amendments that generally reduce the maximum of the guideline range by less than six months.”).

cases is worth any issues with administrability given the significant reductions that may be available to those defendants who qualify.⁸

Further, as the PAG has already noted, if the courts are concerned with being flooded with applications for reductions, whether or not the Commission makes these amendments retroactive, the courts will be flooded by motions for sentence reductions. An amendment's retroactivity bears little relationship to whether defendants sentenced under the drug guideline will apply for a reduction. They most certainly will, and the courts, probation officers, federal prosecutors and federal defense counsel must work together to address those applications.

C. The PAG Supports Retroactive Application of the Amendments Related to the Robbery Guideline and Criminal History

The PAG also supports retroactive application of the amendment for “physical restraint” under §2B1.3. This is about fundamental fairness. This amendment is not simply a clarification of how the guideline should be applied, but it is designed to rectify an incorrect application of this enhancement that has resulted in unwarranted sentence disparities among similarly situated defendants across the country.⁹

The Commission's retroactivity analysis identifies the “outer bound” of the number of defendants eligible for relief under this amendment at 1063.¹⁰ This is a relatively modest number of cases and, as an “outer bound,” the actual number of cases may well be less. While there may be some uncertainty regarding the number of defendants eligible for this reduction and the magnitude of any reduction, the PAG believes that the purpose of this amendment, which would level the playing field for defendants across the country, outweighs concerns regarding its impact and administrability.

Finally, with respect to the retroactivity of the amendment related to intervening arrests under the criminal history guideline, the PAG notes that this amendment addresses a circuit split caused by one jurisdiction. Unlike all other circuits across the country, the Court of Appeals for the Seventh Circuit determined that a traffic stop is an intervening arrest for purposes of the criminal history guideline. While

⁸ See Defender Comment at 12-16.

⁹ See *id.* at 16-17.

¹⁰ See Retroactivity Impact Analysis at 14-15.

there is no information available regarding the impact of this amendment,¹¹ it is limited to cases from one circuit, and for that reason, the PAG believes that the number of eligible cases will be relatively limited. Consistent with the PAG's position on presumptive retroactivity, the PAG sees no reason why this amendment should not be applied retroactively.

¹¹ *See id.* at 17.